United States District Court
Southern District of Texas
ENTERED
July 21, 2022
Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHLOE BAKER, *Plaintiff*,	§	
	§	
	§	
v.	§	CIVIL ACTION NO. 4:20-CV-03870
	§	
LONE STAR LEGAL,	§	
AID,	§	
Defendant.	§	

MEMORANDUM AND ORDER

Pending before the Court is Defendant's Motion for Summary Judgment.[1] ECF No. 68. Baker filed an untimely response. ECF No. 88. Lone Star filed a reply (ECF No. 90) and Baker filed a surreply (ECF No. 91). Having considered the Motion, Reply, and the applicable law, the Motion is GRANTED.

I. Background

The statements in this section are undisputed for purposes of summary judgment unless otherwise noted.

Baker's employment with Lone Star Legal Aid

Defendant Lone Star Legal Aid ("Lone Star") is a non-profit organization that provides legal services and representation to low-income individuals in Texas and Arkansas. ECF No. 68-1 at 4 ¶ 1. Lone Star operates, in part, by using short-term grants for projects and regularly employs individuals on a temporary basis pursuant to temporary worker agreements. *Id*. at 5 ¶ 4. In 2017, Lone Star's Military Veterans Unit ("MVU") received a short-term grant from the Texas Veterans Commission Project ("TVCP"), which allowed Lone Star to hire several temporary employees to

[1] The parties consented to proceed before a United States Magistrate Judge for all purposes, including final judgment. ECF No. 70.

work within the unit through June 2018. *Id*. at 5 ¶ 6. On April 2, 2018 and pursuant to a temporary worker agreement, Lone Star hired Plaintiff Chloe Baker ("Baker") to work as a paralegal within the MVU. *Id*. at 6 ¶ 7. Baker disputes that she was a temporary employee, but failed to attach the exhibit she cites as evidence that she was a permanent employee. In fact, Baker failed to file all but one exhibit she cites to in support of her Response.

On June 30, 2018, the TVCP grant expired but Lone Star expected to continue funding temporary employment using a Victims of Crime Act ("VOCA") grant. *Id*. at 6 ¶ 8. Due to funding available under the VOCA grant, Lone Star was able to renew the employment of Baker and one other temporary employee for two additional three-month periods, extending their temporary employment until December 31, 2018. *Id*. In order to avoid terminating the temporary employees during the holidays, Lone Star notified Baker (and the other temporary employee) on December 21, 2018 that it would extend their employment for an additional thirty days and would terminate their temporary employment on January 31, 2019. *Id*. at 6-7 ¶ 9; *id*. at 52, Ex. 7.

Baker signed a temporary worker agreement on December 26, 2018, agreeing to the final extension through January 31, 2019. *Id*. at 54-55. Two days later, on December 28, 2018, Baker made an oral complaint of workplace harassment and then submitted a written complaint on January 3, 2019. *Id*. at 17:18-23; 57-58. Baker argues that she "began participating in protected activity as early as October 2018" but again, failed to file the exhibit she cites as evidence of prior protected activity. Lone Star terminated the employment of Baker and the other temporary employee on January 31, 2019. *Id*. at 74.

Baker's EEOC filings and federal court suit

Baker filed an unverified EEOC inquiry on February 21, 2019 (the "2019 Inquiry"), which was assigned Inquiry number 460-2019-02226. ECF No. 68-1 at 76-78. The 2019 Inquiry identified Lone Star as her employer and complained of race and national origin discrimination and retaliation. *Id*. at 76-77. Baker denied having a disability in the 2019 Inquiry. *Id*. at 78. According to EEOC records, the 2019 Inquiry was closed on March 19, 2019. *Id*. at 83.

On May 5, 2020, Baker filed a new portal inquiry with the EEOC alleging race, national origin, and disability discrimination and retaliation (the "2020 Inquiry"). *Id*. at 87-89. In the 2020 Inquiry, Baker identifies herself as having a disability. *Id*. at 89. The 2020 Inquiry denies that the "claim [had been] previously filed as a charge with the EEOC" and was assigned "EEOC (Inquiry) number: 460-2020-03799." *Id*. at 87. On May 20, 2020, Baker filed a signed and verified EEOC charge alleging race and disability discrimination and retaliation (the "2020 Charge"). *Id*. at 91-92. On August 19, 2020, the EEOC issued its Dismissal and Notice of Rights letter informing Baker that her 2020 charge was not timely filed with the EEOC. *Id*. at 94-97. On September 23, 2020, the EEOC sent Baker a letter describing a meeting that took place on March 13, 2019, during which Baker was advised by an EEOC investigator of her right to file a charge. *Id*. at 85. The letter states that although Baker disagreed with the investigator's notes, Baker did not to file a charge within the 300-day period. *Id*.

On November 13, 2020, Baker filed suit in federal court against Lone Star. ECF No. 1. Having twice amended her complaint, Baker's suit alleges discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* and the American Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* ECF No. 17.

Lone Star's Motion for Summary Judgment

Lone Star moves for summary judgment on all of Baker's claims, arguing that Baker failed to exhaust her administrative remedies because she did not file a timely administrative charge of discrimination or retaliation. Lone Star argues in the alternative that even if Baker had exhausted her administrative remedies, her claims cannot survive summary judgment for at least the following reasons: (1) she cannot show Lone Star knew of her alleged disability as required for her disability discrimination and failure to accommodate claims; (2) she has not alleged a hostile work environment that was severe and pervasive; (3) she has not presented a prima facie case of Title VII race discrimination; and (4) she cannot show a causal connection between her protected activity and her termination.

II. Motion for Reconsideration and Motion to Strike

Before turning to Lone Star's Motion for Summary Judgment, the Court addresses Lone Star's Motion for Reconsideration (ECF No. 79) and Lone Star's Motion to Strike (ECF No. 92).

Lone Star filed a Motion for Reconsideration of the Court's order granting Baker's Motion for Extension to file her response to Lone Star's Motion for Summary Judgment. ECF No. 79. Under Federal Rule of Civil Procedure 6(b)(1)(B), the Court may grant a post-deadline motion for an extension if it finds "good cause" and that "the party failed to act because of excusable neglect." FED. R. CIV. P. 6(b)(1)(B). This determination is "an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 395 (1993). These relevant factors include (1) "the danger of prejudice [to the non-movant], (2) "the length of the delay and its potential impact on the judicial proceedings," (3) "the reason for the delay, including whether it was within the reasonable control of the movant," and (4) "whether the movant acted in good faith." *Stotter v.*

Univ. of Tex. at San Antonio, 508 F.3d 812, 820 (5th Cir. 2007) (quoting *Pioneer*, 507 U.S. at 395). Applying the *Pioneer* factors, the Court finds that although the error by Baker's former attorney in failing to file a timely response was careless, Lone Star is not prejudiced by the late filing of response by Baker who is now pro se, the judicial proceedings have not been impacted as the trial date remains the same, and Baker did not act in bad faith. Thus, the totality of the circumstances weighs in favor of finding that the failure to file a timely response was excusable neglect. The Motion for Reconsideration (ECF No. 79) is DENIED.

Lone Star also moves to strike Baker's surreply. ECF No. 92. "Surreplies are highly disfavored because they usually are a strategic effort by the non-movant to have the last word on a matter." *Reyes v. ExxonMobil Pipeline Co.*, No. H-19-2569, 2021 WL 3711175, at *2 (S.D. Tex. Aug. 20, 2021) (internal quotation omitted). "A party must therefore file a motion for leave before filing a surreply." *Bayway Lincoln Mercury, Inc. v. Universal Underwriters Ins. Co.*, No. CV H-19-3817, 2020 WL 8093495, at *1 (S.D. Tex. Dec. 4, 2020). "Leave to file a surreply is not appropriate where the proposed surreply does not include new arguments or evidence or merely restates arguments in the movant's response." *Woolard v. Fluor Enters., Inc.*, No. 4:10-cv-3623, 2013 WL 596581, at *4 (S.D. Tex. Feb. 15, 2013) Here, Baker did not seek leave to file her surreply before doing so. Further, Baker's surreply reiterates arguments made in her response and references documents that she failed to attach to the response. Baker's attachment to her surreply of the exhibits she failed to attach to her late-filed response does not provide a basis for granting leave to file a surreply. *See Bayway Lincoln Mercury, Inc. v. Universal Underwriters Ins. Co.*, 2020 WL 8093495, at *2 (rejecting as "not appropriate" a surreply that attached documents party failed to attach to the response to motion for summary judgment).

Accordingly, the Court finds that Baker's surreply is not appropriate and the Motion to Strike (ECF No. 92) is GRANTED.

III. Summary Judgment Standard

Summary judgment is appropriate if no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a). The party moving for summary judgment has the initial burden to prove there are no genuine issues of material fact for trial. *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th Cir. 2001). Dispute about a material fact is "genuine" if the evidence could lead a reasonable jury to find for the nonmoving party. *Hyatt v. Thomas*, 843 F.3d 172, 177 (5th Cir. 2016). "An issue is material if its resolution could affect the outcome of the action." *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 310 (5th Cir. 2002). If the moving party meets its initial burden, the nonmoving party must go beyond the pleadings and must present evidence such as affidavits, depositions, answers to interrogatories, and admissions on file to show "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). The Court construes the evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in that party's favor. *R.L. Inv. Prop., LLC v. Hamm*, 715 F.3d 145, 149 (5th Cir. 2013).

In ruling on a motion for summary judgment the Court does not "weigh evidence, assess credibility, or determine the most reasonable inference to be drawn from the evidence." *Honore v. Douglas,* 833 F.2d 565, 567 (5th Cir. 1987). However, "[c]onclu[sory] allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation do not adequately substitute for specific facts showing a genuine issue for trial." *U.S. ex rel. Farmer v. City of Houston*, 523 F.3d 333, 337 (5th Cir. 2008) (citation omitted).

IV. Analysis

A. Baker failed to exhaust administrative remedies by not filing a timely EEOC charge.

Lone Star contends it is entitled to summary judgment on all of Baker's claims because Baker failed to exhaust administrative remedies by not filing a timely charge. Administrative exhaustion exists "to facilitate the [EEOC's] investigation and conciliatory functions and to recognize its role as primary enforcer of anti-discrimination laws." *Ernst v. Methodist Hosp. Sys.*, 1 F.4th 333, 337 (5th Cir. 2021) (quoting *Filer v. Donley*, 690 F.3d 643, 647 (5th Cir. 2012)). While the exhaustion requirement is not jurisdictional, the filing of an EEOC charge "is a precondition to filing in district court." *Taylor v. Books A Million*, 296 F.3d 376, 378-79 (5th Cir. 2002) (quotation omitted). A "'[f]ailure to exhaust is an affirmative defense that should be pleaded.'" *Matson v. Sanderson Farms, Inc.*, 388 F. Supp. 3d 854, 877 (S.D. Tex. 2019) (quoting *Davis v. Fort Bend Cty.*, 893 F.3d 300, 307 (5th Cir. 2018)). Thus, to prevail on summary judgment, Lone Star bears the burden of proving the absence of a genuine issue of material fact with respect to Baker's failure to exhaust administrative remedies.

Both Title VII and the ADA require a plaintiff to exhaust administrative remedies before commencing an action in federal court against her employer. *Jennings v. Towers Watson*, 11 F. 4th 335, 342 (5th Cir. 2021). To satisfy the exhaustion requirement, a plaintiff must file a charge with the EEOC within 180 days of a discrete alleged discriminatory act, or within 300 days in a "deferral state." *Carter v. Target Corp.*, 541 F. App'x 413, 419 (5th Cir. 2013); *see* 42 U.S.C. § 1217 (incorporating 42 U.S.C. § 2000e-5(e)(1)). Texas is a deferral state, meaning it has a state agency to resolve civil rights complaints, and therefore Baker was required to file her EEOC charge regarding her Title VII and ADA claims within 300 days of her termination. *Blasingame v. Eli Lily & Co.*, No. H-11-4522, 2013 WL 5707324, at *4 (S.D. Tex. Oct. 18, 2013); *Anderson v.*

Venture Express, 694 F. App'x 243, 247 (5th Cir. 2017) (affirming dismissal of claim for failing to exhaust administrative remedies). Baker's employment with Lone Star terminated on January 31, 2019. Therefore, she had until November 27, 2019, at the latest, to file an EEOC charge complaining of discrimination or retaliation under Title VII or the ADA.

1. Baker's 2020 EEOC Charge was not timely filed.

Baker filed a verified EEOC Charge on May 20, 2020, well beyond the 300-day period to file a charge complaining of discriminatory conduct. ECF No. 68-1 at 91-92. As such, the 2020 EEOC charge was not timely filed and can only be considered an "amended charge" if it relates back to amend a timely filed charge. *See Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 878 (5th Cir. 2003) (cleaned up) (explaining that EEOC regulations allow a claimant to "relate back" an untimely charge to a timely filed charge of discrimination "[i]f the amendments involve acts that relate to or grow out of the subject matter of the original charge").

2. Although timely-filed, Baker's 2019 Inquiry is not a "charge."

The uncontroverted summary judgment evidence demonstrates that the only pre-November 27, 2019 EEOC filing Baker made is the 2019 Inquiry she submitted on February 21, 2019. ECF No. 68-1 at 76-78. Lone Star contends the 2019 Inquiry does not constitute a "charge" for purposes of the administrative exhaustion requirements under Title VII and the ADA because it was not verified and cannot be construed as a request for the EEOC to take remedial action.

In *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008) the Supreme Court addressed whether an EEOC intake questionnaire form (not a portal inquiry) can qualify as a "charge" that exhausts administrative remedies. The Supreme Court held that an intake questionnaire may qualify as a charge for purposes of exhaustion if it both 1) satisfies the EEOC's charge-filing requirements and 2) can "be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee." *Holowecki*, 552 U.S. at 402. This test applies to both Title VII and ADA claims. *EEOC v. Vantage Energy Servs., Inc.*, 954 F.3d 749, 754 (5th Cir. 2020).

Although *Holowecki* involved an intake questionnaire rather than a portal inquiry, the Court looks to *Holowecki* to determine whether the 2019 Inquiry may be considered a "charge" since a portal inquiry serves a similar function as an intake questionnaire: both ask the claimant to provide facts concerning the alleged discrimination. *See* https://publicportal.eeoc.gov ("An inquiry is typically your first contact with the EEOC regarding your concerns about potential employment discrimination, which is followed by an interview with EEOC staff. Submitting an inquiry is the first step to determine whether you want to proceed with filing a formal charge of discrimination."); *Martinez v. Prairie Fire Dev. Grp., LLC*, No. 19-cv-2143, 2019 WL 3412264, at *4 n.1 (D. Kan. July 29, 2019) ("[T]he court sees no reason why an online inquiry should be treated differently from an intake questionnaire or any other document short of a formal charge.").

Applying *Holowecki*, the 2019 Inquiry cannot be considered a charge for exhaustion purposes because it neither satisfies the EEOC's charge-filing requirements, nor can it be reasonably construed as a request for the agency to take remedial action.

i. The 2019 Inquiry fails to meet the first prong of *Holowecki* because it is not signed or verified.

The 2019 Inquiry was not signed or verified by Baker. ECF No. 68-1 at 76-78. Therefore, the 2019 Inquiry does not meet the EEOC charge-filing requirements. *Patton v. Jacobs Eng'g Grp., Inc.*, 874 F.3d 437, 443 (5th Cir. 2017). However, the lack of signature and verification are defects that may be cured outside the 300-day filing period. *Edelman v. Lynchburg Coll,*, 535 U.S. 106, 115-19 (2002); 29 C.F.R. § 1601.12(b) ("A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations made therein.”). Therefore, even after the 300-day filing period expired, Baker could have cured the technical defects in the 2019 Inquiry by filing a signed, verified charge that related back to amend the 2019 Inquiry. *See Vantage Energy Servs.*, 954 F.3d at 756 (explaining that the certification of an intake questionnaire that otherwise qualifies as a charge can occur outside the filing period). Thus, Baker could overcome this technical defect by showing that her verified 2020 EEOC charge relates back to amend the 2019 Inquiry. As explained next, Baker cannot make this showing.

It is undisputed that Baker filed a signed, verified EEOC charge on May 20, 2020, but by the time she filed the 2020 Inquiry and the 2020 EEOC charge, her 2019 Inquiry had been closed. ECF No. 68-1 at 83. The Fifth Circuit has not answered whether an untimely verified EEOC charge can relate back to cure a timely unverified filing after the EEOC’s investigation of the unverified filling has been closed. However, at least the Fourth and Tenth Circuits have held that an EEOC charge *cannot* relate back to amend an unverified charge where the EEOC has closed its case on the original charge. *See Balazs v. Liebenthal*, 32 F.3d 151, 157 (4th Cir. 1994) (“a reasonable construction of the EEOC's regulation would simply allow charges to be verified and to relate back only so long as the charge is a viable one in the EEOC's files, but that where, as here, a right to sue letter has issued, a suit has been instituted and the EEOC has closed its file, there is no longer a charge pending before the EEOC which is capable of being amended.”); *Glapion-Pressley v. City & Cty. of Denver*, No. 21-1223, 2022 WL 1112965, at *4 (10th Cir. Apr. 14, 2022) (“because the EEOC had long since issued her right-to-sue letter and closed the case, [plaintiff’s] belated attempt to cure the verification defect was too late”).

Lone Star’s summary judgment evidence shows the EEOC had closed its file on the 2019 Inquiry before Baker filed the 2020 EEOC charge, so there was no longer any viable charge or inquiry capable of being amended. Indeed, Baker has neither controverted Lone Star’s summary judgment evidence nor presented any case law from which the Court could conclude that a verified EEOC charge can relate back to amend a timely-filed inquiry that was closed by the EEOC before the verified charge was filed. The Court concludes that the untimely-filed 2020 EEOC charge cannot relate back to amend the timely-filed, unverified 2019 Inquiry because the 2019 Inquiry was closed before Baker filed the verified 2020 charge. Therefore, the unverified 2019 Inquiry fails to satisfy the first required prong of *Holowecki*.

ii. The 2019 Inquiry fails to satisfy the second prong of *Holowecki* because it cannot be reasonably construed as a request for the EEOC to take remedial action.

A filing may be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between the employer and the employee if "an objective observer would believe that the filing taken as a whole suggests that the filer request[ed] the agency to activate its machinery and remedial processes." *Crevier-Gerukos v. Eisai, Inc.*, No. H-11-0434, 2012 WL 681723, at *7 (S.D. Tex. Feb. 29, 2012) (quoting *Williams v. CSX Transp. Co.*, 643 F.3d 502, 508-09 (6th Cir. 2011)). Unlike the EEOC's charge filing requirements, there is no regulation permitting a party to "cure" this issue by amending the original filing with an untimely filed charge.

In *Holowecki*, the Supreme Court explained that an intake questionnaire, by itself, did not constitute a "charge" because the statements in the questionnaire did not request agency action and the wording of the questionnaire "suggest[ed] . . . that the form's purpose [was] to facilitate 'pre-charge filing counseling' and to enable the agency to determine whether it has jurisdiction over potential charges." *Id.* Rather, the Court's finding in *Holowecki* was based on an affidavit that accompanied the questionnaire and in which the plaintiff asked the EEOC to "force Federal Express to end their age discrimination." *Id.*

The 2019 Inquiry cannot "be reasonably construed as a request for the agency to take remedial action to protect the employee's rights or otherwise settle a dispute between [Baker] and [Lone Star]." *Holowecki*, 552 U.S. at 402. The 2019 Inquiry lacks any statement by which an objective observer could find that Baker was requesting the agency to activate its machinery and remedial processes. Courts analyzing EEOC intake questionnaires have found that a plaintiff satisfies this requirement by checking a box with the language: "I want to file a charge of discrimination, and I authorize the EEOC to look into the discrimination I described above." *See, e.g.*, *Stone v. Academy, Ltd.*, 156 F. Supp. 3d 840, 844-46 (S.D. Tex. 2016). The 2019 Inquiry contains no such box, and "the questions asked in the inquiry do not seek that type of response." *Martinez*, 2019 WL 3412264, at *4. Therefore, courts analyzing whether an "inquiry" constitutes a "charge" look to whether subsequent actions demonstrate an intent to file a charge. *See, e.g.*, *Anderson v. AHS Hillcrest Med. Ctr., LLC*, No. 2021 WL 3519280, at *8 (N.D. Okla. Aug. 10, 2021) ("Plaintiff's subsequent actions after filing her inquiry do not demonstrate that she desired to start the EEOC administrative process."); *Muldrow v. South Carolina Dep't of Corrs.*, C.A. No. 2:19-3498, 2020 WL 4588893, at *7 (D.S.C. Apr. 7, 2020) (finding it appropriate to consider other evidence to determine if Plaintiff took steps to further action by the EEOC).

Baker's conduct after she filed the inquiry does not demonstrate an intent to start the EEOC administrative process. The summary judgment evidence includes a letter dated September 23, 2020 sent by the EEOC to Baker, recounting that Baker met with an EEOC investigator on March 13, 2019 and had been advised at that time of her right to file a charge of discrimination. ECF No. 68-1 at 85. The letter states that Baker chose not to file a charge at that time, *id.*, and the EEOC records reflect that the 2019 Inquiry file was closed six days after Baker met with the EEOC investigator. *Id.* at 83. Although the letter recognizes that Baker disputes the statements in the

EEOC investigator's notes that she was informed of her right to file a charge, Baker has presented no other summary judgment evidence demonstrating her intent to file a charge of discrimination before the 2019 Inquiry was closed by the EEOC. In fact, the record contains no evidence that Baker intended or attempted to file a charge of discrimination until she filed a new inquiry on May 5, 2020. *Id.* at 87-89. Accordingly, the Court finds that the 2019 Inquiry cannot be reasonably construed as a request for the agency to take remedial action to protect Baker's rights or otherwise settle a dispute between Lone Star and Baker and thus does not constitute a "charge" for purposes of Title VII and ADA exhaustion requirements.

In sum, having found that no genuine dispute of material facts exist as to whether Baker filed a timely, verified charge, the Court concludes that Baker did not exhaust her administrative remedies, and her claims are subject to dismissal on that basis alone.

B. Even if the 2019 Inquiry were a viable charge, Lone Star is still entitled to summary judgment on all claims.

Even apart from the issue of exhaustion, Lone Star is entitled to summary judgment on all of Baker's claims for the reasons that follow.

1. Baker's disability discrimination and failure to accommodate claims are untimely.

It is undisputed that Baker's disability discrimination and failure to accommodate claims alleged in the 2020 Inquiry and 2020 Charge are untimely as they were filed more than 300 days after the alleged conduct. EEOC regulations allow a plaintiff to amend her initial charge outside of the 300-day window to bring such claims, "if the amendments relate back to the original charge" and the facts supporting the amendments and the original charge are essentially the same. *Thibodeaux v. Texas Dep't of Criminal Justice*, 660 F. App'x 286, 289 (5th Cir. 2016) (citing 42

U.S.C. § 2000e-5(e)(1)). However, Baker presents no argument or evidence that her disability discrimination and failure to accommodate claims relate back to amend a timely filed charge.

The 2019 Inquiry alleges race and national origin discrimination and retaliation. ECF No. 68-1 at 76. Nowhere in the 2019 Inquiry does Baker allege disability discrimination or a failure to accommodate nor does she provide facts from which the Court could infer such claims. To the contrary, in the 2019 Inquiry, Baker states "I do not have a disability." *Id*. at 78. Because Baker failed to allege any facts supporting disability discrimination or a failure to accommodate claim in the 2019 Inquiry, she was foreclosed from amending the inquiry to include such claims outside of the 300-day filing period. As such, Baker's disability and failure to accommodate claims must be dismissed as untimely. *Books A Million, Inc.*, 296 F.3d at 379.

2. Baker has failed to present a prima facie hostile work environment claim.

To establish a hostile work environment claim under Title VII, a plaintiff must show (1) she is a member of a protected group; (2) she was subjected to unwelcome harassment; (3) the harassment complained of was based on her membership in a protected group; (4) the harassment complained of affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment in question and failed to take prompt remedial action. *Williams-Boldware v. Denton Cty.*, 741 F.3d 635, 640 (5th Cir. 2014). "A defendant may avoid Title VII liability when harassment occurred but the defendant took 'prompt remedial action' to protect the claimant." *Id*. (quoting *Hockman v. Westward Comm'ns, LLC*, 407 F.3d 217, 329 (5th Cir. 2004)).

Lone Star argues that Baker cannot establish a hostile work environment claim because the racial harassment she identifies was not directed at her and thus could not affect a term, condition, or privilege of employment. Racial harassment affects a "term, condition, or privilege of employment" if its "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 651 (5th Cir. 2012). "To be actionable, the work environment must be 'both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.'" *Id*. (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998)). The Court must take into consideration all the circumstances including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; or and whether it unreasonably interferes with an employee's work performance. *Id*. (quoting *Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002)).

Baker's hostile work environment claim alleges that her co-workers referred to her as "girl," "black girl," and the "help." However, the summary judgment evidence reveals that these references were not made by Baker's co-workers *to* Baker. Rather, these comments reflect the statements of clients and intake applicants and were recorded as direct quotes in Baker's co-worker's intake and appointment notes. For example, one intake note between Courtney Paulding, a Lone Star paralegal, and an individual described as "C," reads: "C stated that he was going back to the VA to talk to 'that attorney and her helper.'" ECF No. 68-1 at 60-61. When a supervisor advised Paulding that that this language "should not be part of any applicants' notes," Paulding acknowledged the poor choice of words but clarified: "I try to capture the conversations as the applicant/client communicates." *Id*. at 60. Baker has not presented any evidence that her co-workers made statements to Baker using the terms "girl," "black girl," and the "help." Nor has she demonstrated that those references were used anywhere outside of the intake and appointment notes which reflect comments of clients and applicants.

The Court assumes Baker perceived her co-workers' documentation of client references to her as "girl," "black girl," and the "helper" to be offensive, hostile and abusive. However, viewing the evidence in the light most favorable to Baker, there is no evidence from which a reasonable jury could conclude that these comments were "sufficiently severe or pervasive to alter the conditions of [Baker's] employment and create an abusive working environment." *Ramsey*, 286 F.3d at 269 (internal quotations omitted). Baker has not shown the use of these terms on a frequent basis sufficient to show harassment that was pervasive enough to support a hostile work environment. *See Faragher*, 524 U.S. at 788 ("[O]ff hand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."); *Frazier v. Sabine River Auth. La.*, 509 F. App'x 370, 372-74 (5th Cir. 2013) (finding that a co-worker's use of a racial slur and gesture of hanging a noose around another co-worker's neck were "isolated and not severe or pervasive enough to support a hostile work environment claim."). Furthermore, the allegedly offensive conduct itself does not meet the standard for harassment sufficiently severe to alter a term or condition of Baker's employment. *See Brooks v. Firestone Polymers, L.L.C.*, 640 F. App'x 393, 399 (5th Cir. 2016) (finding that racial slurs and "black faces drawn in the bathroom stalls" were "reprehensive" but insufficient for the hostile work environment claim to survive summary judgment); *Baker v. FedEx Ground Package Sys., Inc.*, 278 F. App'x 322, 329 (5th Cir. 2008) (supervisor's comments to African-American employee that "she did not want to work with people" like employee did not show a race-based hostile work environment). Without additional conduct, the comments contained in the client meeting and intake notes are, at most, offensive utterances that fail to support a prima facie case of a hostile work environment.

Baker has also failed to present evidence showing that these remarks interfered with her ability to work. Baker contends that stress from “being assigned 41 new work flows” caused her to be placed in psychiatric bed rest. ECF No. 88 at 9. Baker has not put forth any evidence from which a reasonable jury could find that her co-workers’ notes interfered with her ability to do her job. *Brooks*, 640 F. App’x 393, 399 (5th Cir. 2016) (plaintiff failed to make a prima facie case of hostile work environment where “offensive events, while reprehensible, establish[ed] only isolated incidents and offhand remarks, did not involve physical threats, were not apparently directly addressed to [plaintiff], and [did] not appear to have interfered with his work.”).

Baker raises additional allegations to support her hostile work environment claim, alleging: 1) office members began to refer to her as “girl” or “gal”; 2) a co-worker refused a workflow from Baker 3) an intake specialist told others in the office that Baker “kissed butt”; 4) an intake specialist made false allegations that Baker left work; and 5) co-workers attempted to get clients and applicants to file grievances on Baker. Each allegation lacks actual evidentiary support and cannot save Baker’s hostile work environment claim from summary judgment. *See Jones v. Gulf Coast Restaurant Grp., Inc.*, 8 F. 4th 363, 368 (5th Cir. 2021) (quoting *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007)) (“[A] party cannot defeat summary judgment with ‘conclusory allegations, unsubstantiated assertions, or only a scintilla of evidence.’”).

Because Baker has failed to present evidence from which a reasonable jury could conclude that her co-workers’ conduct was sufficiently severe or pervasive to affect a term, condition, or privilege of her employment, Baker has failed to establish a prima facie case for a hostile work environment and Lone Star is entitled to summary judgment on this claim.

3. Baker has failed to present a prima facie case of Title VII race discrimination.

Baker has not produced direct evidence showing that her termination was motivated by race. In the absence of direct evidence of discrimination, to establish a prima facie case of race discrimination, Baker must show she: "(1) is a member of a protected group; (2) was qualified for the position at issue; (3) was discharged or suffered some adverse employment action by the employer; and (4) was replaced by someone outside [her] protected group or was less treated less favorably than other similarly situated employees outside the protected group." *Stroy v. Gibson*, 896 F.3d 693, 698 (5th Cir. 2018).

Lone Star does not dispute that Baker is a member of a protected group, was qualified for the paralegal position, and was discharged on January 31, 2019. However, Lone Star argues that the uncontested summary judgment evidence demonstrates that Baker cannot meet the fourth element of a prima facie case of racial discrimination under Title VII. Baker has put forth no evidence, direct or circumstantial, to show that she was replaced by someone outside her protected group or that she was treated less favorably than other similarly situated employees outside her protected group. Indeed, Baker's response does not even address her Title VII race discrimination claim. Having failed to put forth *any* evidence to show that she was replaced by someone outside her protected group or was treated less favorably than other similarly situated employees outside her protected group, Baker has failed to meet her burden to make a prima facie case of race discrimination. Lone Star is entitled to summary judgment on this claim.

4. Baker has not produced evidence showing Lone Star's proffered reason for her termination is a pretext.

To make out a *prima facie* case of retaliation, a plaintiff must demonstrate (1) she engaged in activity protected by Title VII; (2) the employer took an adverse employment action against her;

and (3) there is a causal connection between the protected activity and the adverse employment action. *Aryain v. Wal-Mart Stores LP*, 534 F.3d 473, 484 (5th Cir. 2008). "An employee has engaged in protected activity when he or she has . . . made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing" under Title VII. *Id.* at 484 n.8 (quoting 42 U.S.C. 2000e-3(a)). For purposes of a Title VII retaliation claim, an adverse employment action is an action that could dissuade a reasonable worker from making or supporting a charge of discrimination. *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 2409 (2006).

If a plaintiff meets this prima facie burden, a presumption of retaliation arises, shifting the burden of production to the employer to articulate a legitimate, nondiscriminatory reason for its employment action. *Hernandez v. Metro. Transit Auth. of Harris Cty.*, 673 F. App'x 414, 417 (5th Cir. 2016). If the employer states a legitimate reason for its action, the inference of discrimination or retaliation disappears, and the burden shifts back to the plaintiff to present evidence that the employer's proffered reason is merely pretextual. *Id.* "In contrast to the minimal burden that a plaintiff bears when establishing his prima facie case, a plaintiff must produce 'substantial evidence of pretext.'" *Hernandez*, 673 F. App'x at 419 (quoting *Auguster v. Vermilion Par. Sch. Bd.*, 249 F.3d 400, 402–03 (5th Cir. 2001)).

Lone Star argues that even if Baker could establish a prima facie case for retaliation under Title VII, it had a legitimate, nondiscriminatory reason for terminating Baker because the grant that provided funding her position expired on December 31, 2018 and no other funding source available. Lone Star has presented testimony via sworn declaration that Baker was employed pursuant to a temporary worker agreement that was funded by a grant. ECF No. 68-1 at 42-55. After the grant funding expired in December 2018, Lone Star and Baker entered into a final month-long agreement for the month of January 2019 because Lone Star did not want to terminate Baker during the holidays. *Id*. at 6-7 ¶ 9. The January 2019 Temporary Agreement, dated December 21, 2018 provided that Baker's temporary employment would terminate on January 31, 2019 and was signed by Baker on December 26, 2018—a day before she engaged in protected conduct by filing an internal complaint. ECF No. 68-1 at 55; 17:12-23. Baker cannot show a causal connection between the protected activity and her termination because *before* she made the internal complaint she had been told, and signed an agreement stating, that her employment would end on January 31, 2019.

To the extent Baker argues she suffered an adverse employment action because Lone Star failed to re-hire her after she filed her complaint, Baker has put forth no evidence demonstrating that she applied for a position after her contract terminated on January 31, 2019. *See Okpala v. City of Houston*, 397 F. App'x 50, 56 (5th Cir. 2010) (finding that plaintiff failed to make a prima facie case for retaliation where plaintiff failed to produce evidence that he applied for positions for which he was qualified and for which he was not hired). Furthermore, Baker has produced no evidence, much less substantial evidence, showing Lone Star's proffered reason for her termination and failure to be rehired is pretext.

Baker argues in her Response that in November 2018, a month after she made complaints about "office dynamics," she was moved into isolation. ECF No. 88 at 17-18. This allegation fails to survive summary judgment for two reasons. First, under Title VII's exhaustion requirements, "no issue will be the subject of a civil action until the EEOC has first had the opportunity to attempt to obtain voluntary compliance." *Pachecho v. Menta*, 448 F.3d 783, 789 (5th Cir. 2006). Whether a plaintiff has exhausted a Title VII claim is determined "not solely by the scope of the administrative charge itself, but by the scope of the EEOC investigation ' which can reasonably be expected to grow out of the charge of discrimination.'" *Id*. (quoting *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455, 463 (5th Cir. 1970)). "Thus, 'a Title VII lawsuit may include allegations like or related to the allegation[s] contained in the [EEOC] charge and growing out of such allegations during the pendency of the case before the [EEOC].'" *Stingley v. Watson Quality Ford, Jackson, MS*, 836 Fed. App'x 286, 291 (5th Cir. 2020) (quoting *McClain v. Lufkin, Indus., Inc.*, 519 F.3d 264, 272-73 (5th Cir. 2008)). Baker did not include this allegation in her 2019 Inquiry. ECF No. 68-1 at 75-78. Nor does Baker present any evidence by which the Court could find that complaint made in November 2018 was within the scope of the EEOC investigation. As such, Baker failed to exhaust this claim. Moreover, Baker's conclusory allegations include no supporting evidence to support these claims, a requirement to survive summary judgment. *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998) ("[U]nsubstantiated assertions are not competent summary judgment evidence."). Accordingly, Lone Star is entitled to summary judgment on Baker's retaliation claim.

V. Conclusion

For the reasons discussed above, the Court GRANTS Defendant's Motion for Summary Judgment (ECF No. 68). Final judgment is entered by separate order.

Signed on July 21, 2022 at Houston, Texas.

Christina A. Bryan
United States Magistrate Judge